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THE LAW OF BLASPHEMY

IS CHRISTIANITY part of the Law of England? It would seem that if it ever was so, it is so no longer. Such at least is the conclusion which Austin's "simple-minded layman" will undoubtedly draw from the recent decision of the House of Lords in *Bowman* v. *The Secular Society, Limited,* [1917] A. C. 406. The lawyer who recognizes that such phrases as the above can have little or no value in legal science will be more concerned to note the unanimous determination of the final court of appeal in Great Britain in favor of the view of the law of blasphemy expressed by Lord COLERIDGE, L. C. J., in *Reg.* v. *Ramsay and Foote,* 15 Cox C. C. 231, against the contrary doctrine of the late Sir James Fitzjames STEPHEN, and the overruling by general consent (Lord FINLAY, L. C., alone dissenting) of the well-known case of *Cowan* v. *Milbourn,* L. R. 2 Ex. 230. In the British constitution a judgment of the House of Lords has the same finality as an Act of Parliament, and so we may take it as settled for all time (in the absence of intervention of Parliament) that in English law "the crime of blasphemy is not constituted by a temperate attack on religion in which the decencies of controversy are maintained". (Lord FINLAY, L. C., at p. 423.)

What it is constituted by is perhaps, notwithstanding the pronouncements of five learned Lords of Appeal, not free from doubt. It seems that in England as in Scotland "scurrility or indecency is an essential element of the crime of blasphemy at common law", (Lord FINLAY, *ubi sup.*); that "to constitute blasphemy at common law there must be such as element of vilification, ridicule or irreverence as would be likely to exasperate the feelings of others and so lead to a breach of the peace", (Lord PARKER, p. 446); that words may be blasphemous "for their manner, their violence, or ribaldry, or, more fully stated, for their tendency to endanger the peace then

and there, to deprave public morality generally, to shake the fabric of society, and to be the cause of civil strife" (Lord SUMNER, at p. 466); that the offence is associated with, and perhaps constituted by, "violent, offensive, or indecent words"; and "the common law of England does not render criminal the mere propagation of doctrines hostile to the Christian faith. The crime consists in the manner in which the doctrines are advocated, and whether in each case this is a crime is a question for the jury, who should be directed in the words of ERSKINE, J., in *Shore* v. *Wilson*[1] quoted by the Master of the Rolls in his judgment on the present case", (Lord BUCKMASTER, at p. 470); that "blasphemy is constituted by violent and gross language, and the phrase 'reviling the Christian religion' shows that without vilification there is no offence." (at p. 475).[2]

To extract a definition of blasphemy from such a wealth of dicta might be no easy work. But we must remember that *in jure omnis definitio periculosa est* and be thankful that if we do not know what blasphemy is, at all events we know what it is not. So far, at least, the judgment of the House of Lords is conclusive.

Before the House gave its decision there was room for doubt, for uncertainty. The views of Lord COLERIDGE and of Sir James STEPHEN had their respective partizans. Today the uncertainty is removed. We know what the law is, so far as this consists in knowing what it is not, and with the same qualification, we know what the law always has been; for the business of judges, however eminent, of courts of justice, however august, is not to make law, but to ascertain it. We must take it, then, that the Bench, presided over by Lord RAYMOND, who in *Rex* v. *Woolston*, 1 Barn. K. B. 162, refused to listen to an argument tending to show that Christianity might be lawfully called in question, were wrong in their law, and that they and the numerous later judges, who following HALE, C. J.,[3] have declared that "Christianity is parcel of the laws of

[1] "It is indeed still blasphemy, punishable at common law, scoffingly or irreverently to ridicule or impugn the doctrines of the Christian faith, and no one would be allowed to give or to claim any pecuniary encouragement for such purpose; yet any man may, without subjecting himself to any penal consequences, soberly and reverently examine and question the truth of those doctrines which have been assumed as essential to it. And I am not aware of any impediment to the application of any charitable fund for the encouragement of such inquiries." 9 CL. & F. at p. 524, cited by Lord Cozens-Hardy, M. R. [1915], 2 Ch. at p. 463.

[2] The learned judge refers to *Harrison* v. *Evans*, 2 Burn's Ecc. Law at p. 218, in which Lord Mansfield said:—"The common law of England * * * knows of no prosecution for mere opinions. For atheism, blasphemy, and reviling the Christian religion, there have been instances of persons prosecuted and punished upon the common law * * * ".

[3] *Taylor's Case*, 1 Vent. 293.

England", did not know what they meant, as, indeed, they very likely did not.

It is possible that their Lordships are right in their history as, beyond private liberty of question, they are right in their law. Certainly there are indications—*The Queen* v. *Read* (Fortesc. 98) is a surprising example—of a disinclination on the part of the common law courts to burden themselves with matters which even so late as the eighteenth century were considered to fall within the competence of the ecclesiastical courts. On the other hand, the prevailing sentiment of today towards religion is very different from what it was two or two and a half centuries ago, and it cannot be denied, whatever legal theory may say to the contrary, that the decisions of courts of justice take their color from the tendency of the age. There will be many, therefore, who—the authoritative pronouncement of the House of Lords notwithstanding—will still be inclined to agree with the late Mr. Justice STEPHEN, that "to say that the crime [of blasphemy] lies in the manner and not in the matter appears to me to be an attempt to evade and explain away a law which has no doubt ceased to be in harmony with the temper of the times".[4] However this may be, the House of Lords has decided, and that for an English lawyer is the end of the matter. The decision makes law. Therefore it would be impertinent to call it in question. But it is permitted to examine the processes of reasoning by which their Lordships arrived at their conclusion, and to this the remainder of this paper will be directed.

Like any other court administering the common law, the House of Lords goes for its law to the cases. According to the now established rule it is bound by its own decisions, but not by the decisions of any inferior tribunal. Nevertheless the pronouncements of inferior courts if not authoritative are at least persuasive. They are entitled to be weighed in the balance of the judicial mind. The presumption is that they were rendered in accordance with justice and that they applied the right rule of law to the facts. Strictly speaking, no decision goes beyond the established or assumed facts of the particular case.[5] So far the facts limit the rule. But just as the laws of nature are collected from a multitude of single instances, so the rules of law are supposed to be generalised from previous decisions. Both are generalisations from particulars but not to the same degree. The great difference is that whereas the laws of nature are implicit in the facts of nature so that all the grouped facts illustrate and express the law, in the case of the laws

[4] Stephen Hist. Criminal Law, vol. 2, p. 475.

[5] Per Halsbury L. C. in *Quinn* v. *Leathem* [1901] A. C. at p. 506.

of man this is not so. There the uniformity which ultimately prevails as a rule of law is generalised not from all the grouped facts, that is, from all the decisions relating to the same subject-matter, but only from some of them. The others do not affirm the rule. They contradict it. This must always be the case when the decisions speak with uncertain or conflicting voices. The matter which comes up for decision today, let us suppose, is not covered by authority. There is no case on all fours with it. The ground is not already occupied. The Court, then, must hunt about in the neighborhood, as it were, for analogies. A rule must be looked for and found (for found it must be) in other cases which have something in common, but perhaps not the one thing essential in common, with the case under consideration. Very likely the doubt which arises in the later case never presented itself to the judges who passed upon the earlier cases. Perhaps they tacitly assumed as true what is now called in question and if they refrained from affirming it did so not because the proposition was doubted, still less denied, but simply because it never occurred to them or to any one else to doubt or deny it. This is especially likely to be the case at times when the judicial mind is satisfied with a vague generality such as that which asserts that Christianity is parcel of the laws of England. It is not in such an atmosphere that the definition of blasphemy will receive close analysis, or an exact line be drawn between the matter and the manner of a blasphemous libel. So it may happen that for a century or more the law remains uncertain because not thought out. Cases accumulate, but the law is not elucidated. When at last a straight issue arises which can be no longer ignored or evaded the Court is under the necessity of deciding, and of deciding not upon caprice, but by some supposed rule of law. The rule must be looked for in the decisions, but it is not there. Instead of a clear statement of principle we find only obscure suggestions of conflicting principles—some rhetoric, many dicta, little law, no guidance. In such circumstances to say that the rule is found in the cases is contrary to fact. Found in or suggested by some of the cases it may be, but found in the cases in the sense that the laws of nature are found in the phenomena of nature, it is not. So far from the rule being derived from the decisions, the decisions are tested by the rule. It is not a case of inductive reasoning, but of deduction, the rule itself being antecedently determined on grounds of reason, convenience, public policy or individual prejudice.

The above contention is, of course, contrary to orthodox doctrine, but it is in accordance with what actually takes place. The decision of the House of Lords in *Bowman* v. *The Secular Society,*

Limited, is a case in point. Their Lordships as an ultimate court of appeal, untrammeled by previous decisions of their own House were, in law, free to decide as they pleased. The cases, far from being an aid, were something of an embarrassment. An extract from Lord DUNEDIN'S judgment shows that he would have been more at ease without them.

"My Lords, I have said that I have formed my opinion not without hesitation; but that hesitation is due to one fact only. Had there been no authorities to deal with, and I were to approach the matter from the point of view of legal principle alone, I do not think I should have felt much difficulty. What has troubled me is that I think it is impossible to decide the case as I think it should be decided without going counter to what has been said by judges of great authority in past generations. It is always, I feel, no light matter to overrule such pronouncements."[6]

Clearly his Lordship has some way of arriving at the law which does not consist in the examination of cases. Why need he examine them since they do not bind him? He knows how the case "should be decided" and regrets that it cannot be decided as it should be without running counter to what has been said by eminent judges of bygone days. Lord DUNEDIN finds all that is necessary to a just decision in a recourse to "legal principle". What this means is not quite apparent. A legal principle not enshrined in any decision relating to the law of blasphemy and yet, when applied, fit to determine what that law is, scarcely admits of precise statement. When the learned judge speaks of approaching the matter from the point of view of legal principle, does he mean more than this—that his own sense of right and fitness, the reaction of his mind to the moral environment, would, in his judgment lead to a right conclusion? If this is so, the point is reached at which law loses its identity in the larger precepts of morality. The learned judge seems to turn his back upon the cases, which point nowhere or in an undesired direction, to follow the plainer admonitions of *"private justice, moral fitness and public convenience"*[7] as he sees them.

The other Lords do the same, though perhaps less consciously. The Lord Chancellor, Lord FINLAY—passes in review the main cases on the subject of blasphemy prior to *Reg.* v. *Ramsay and*

[6] [1917] A. C. at p. 432.

[7] "It could be done only on principles of *private justice, moral fitness,* and *public convenience;* which, when applied to a *new* subject, make common law *without* a precedent; much more, when received and approved by *usage.*" Per Willes J. in *Millar* v. *Taylor,* 4 Burr. at p. 2312.

Foote,[8] viz., *Rex* v. *Taylor*,[9] *Rex* v. *Woolston*,[10] *Rex* v. *Williams*,[11] ("in connection with which *Rex* v. *Mary Carlile*[12] and *Rex* v. *Eaton*[13] should be referred to"), *Rex* v. *Waddington*,[14] *Reg.* v. *Hetherington*.[15] In all the cases, he finds that the language used was scurrilous and offensive, though this is less apparent in the reports of *Rex* v. *Woolston* than in the others." But examination of the libels in respect of which informations in that case were filed * * * shows that the sacred subjects treated by him were handled with a great deal of irreverence, and in many passages language was used by him that was blasphemous in every sense of the term."[16] The Lord Chancellor concludes: "The true view of the law of blasphemy appears to me to be that expressed by Lord DENMAN in *Rex* v. *Hetherington*, which is substantially in accordance with that taken by Lord COLERIDGE *in Reg.* v. *Ramsay and Foote* and followed by PHILLIMORE, J., in *Rex* v. *Boulter*."[17]

It is unnecessary to review the judgments of the other members of the Court, though each of them contains much that is of interest and value. More cogently, perhaps, in them than in the Lord Chancellor's judgment, the impression forces itself on the reader that the court progresses from the rule to the cases, and not from the cases to the rule. Lord DUNEDIN, we have seen, has recourse to "legal principle." Lords PARKER and BUCKMASTER rely also upon the argument *ab inconvenienti*. All agree with Lord FINLAY that it is not and never has been part of the law of England that a temperate and respectful attack on the fundamental doctrines of Christianity exposes the person who makes it to criminal proceedings.

Has it really never been so? Is it believed that such was the view of Lord HOLT, who tried Taylor in 1675, of Lord RAYMOND who tried Woolston in 1729, of Lord KENYON, whose zeal for religion converted Julian the Apostate into an apologist for Christianity at the trial of Williams in 1797,[18] of Lord ELLENBOROUGH, who sentenced Eaton in 1812? Would any one of these learned judges—all Chief Justices of England—have condoned as falling outside the limits of legal blasphemy the lecture which Cowan proposed

[8] 15 Cox C. C. 231.
[9] 1 Vent. 293.
[10] Fitzg. 64; 2 Str. 834; 1 Barn. K. B. 162.
[11] 26 St. Tr. 653.
[12] 3 B. & Al. 167.
[13] 31 St. Tr. 927.
[14] 1 B. & C. 26.
[15] 5 Jur. 529; 4 St. Tr. (N. S.) 563.
[16] [1917] A. C. 422, 423.
[17] 72 J. P. 188.
[18] 26 St. Tr. 704, "Julian, Justin Martyr and other Apologists * * * ".

to deliver in Milbourn's hall? To maintain the affirmative is to do violence to the historical sense.

The second principal argument for the appellants in *Bowman* v. *The Secular Society, Limited,* was directed to the point that a court of law would not assist in the promotion of such objects as that for which the Secular Society was formed whether they were criminal or not. On this point the Lord Chancellor differed from his colleagues taking the view that the law was correctly stated in *Briggs* v. *Hartley* and in *Cowan* v. *Milbourn.* His judgment contains a grave protest against a court of law waiting upon the spirit of the age.

"But we have to deal not with a rule of public policy which might fluctuate with the opinions of the age, but with a definite rule of law to the effect that any purpose hostile to Christianity is illegal. The opinion of the age may influence the application of this rule, but cannot affect the rule itself. It can never be the duty of a Court of law to begin by inquiring what is the spirit of the age and in supposed conformity with it to decide what the law is."[19]

This argument failed to carry conviction with the other members of the Court. If the objects for which the Secular Society was incorporated were not illegal—and on that point the Lords were unanimous—what was to prevent it from claiming a legacy under Mr. Bowman's will? Lord DUNEDIN deals with this point as follows:—

"Criminal liability being negatived, no one has suggested any statute in terms of which it—by which I mean the supposed use of the money—is directly prohibited. There is no question of offence against what may be termed the natural moral sense. Neither has it been held, I think, as being against public policy, as that phrase is applied in the cases that have been decided on that head. Now if this is so, I confess I cannot bring myself to believe that there is still a terra media of things illegal which are not criminal, not directly prohibited, not contra bonos mores, and not against public policy. Yet that, I think, is the result of holding that anything inconsistent with Christianity as part of the law of England cannot in any way be assisted by the action of the Courts".[20]

The House of Lords therefore, Lord FINLAY, L. C., dissenting, refused to follow *Briggs* v. *Hartley*[21] and *Cowan* v. *Milbourn*,[22] which are accordingly overruled. For the reasons stated above one

[19] [1917] A. C. at p. 432.
[20] At p. 434.
[21] 19 L. J. (Ch.) 416.
[22] L. R. 2 Ex. 230.

may be permitted to speculate whether the milder view of blasphemy accepted by Lord FINLAY himself does not conflict with his canon forbidding courts of law to wait upon the spirit of the age. Having gone so far he might have gone the whole way and concurred with the other Lords of Appeal in declaring *Briggs* v. *Hartley* and *Cowan* v. *Milbourn* to be wrongly decided.

That the law of blasphemy is today what it always was and always was what it is today, is, at all events in legal theory, the consequence of *Bowman* v. *The Secular Society, Limited,* but it is a consequence from which the members of the court, or some of them, seem to shrink. The difficulty is to find a formula which admits that the law is changed, while denying that this or that decision has changed it. Lord SUMNER, apparently, throws the burden on the jury. Just as a libel consists in a writing which "a jury, consisting of twelve shopkeepers"[23] finds to be defamatory, so sedition consists in what the same twelve men deem to be subversive of society, and blasphemy (a species of sedition?) in what the jury considers to be subversive of society because subversive of religion. "After all, the question whether a given opinion is a danger to society is a question of the times and is a question of fact".[24] If this is a correct statement of the rationale of the law, we are not likely to hear much more of prosecutions for blasphemy, for a generation which tolerates the excursions into theology of Mr. George Moore and of Mr. Wells (to say nothing of Monsieur Anatole France) certainly has no very exacting standard as regards the so-called decencies of controversy. Another and perhaps safer formula is provided by Lord BUCKMASTER, when he says—"If . . . the law is not clear, it is certainly in accordance with the best precedents so to express it that it may stand in agreement with the judgment of reasonable men".[25] As a standard for a court of ultimate appeal these words seem unexceptionable. But it is noticeable that they are inconsistent with the pretence of finding new law in old cases.

Is our time-honoured method of looking for law in previous decisions nearly played out? And, if so, what is to take its place? In civil law jurisdictions the decisions of the courts are said to be determined by the authority of reason rather than by reason of authority. But this too has its weak side. A system which allows a judge of first instance to decline to follow the considered judgment of a court of appeal simply because he disagrees with it, may be gravely unfair to one of the litigants, who must either submit to

[23] Dicey, Law of the Constitution, Ed. 8, p. 242.
[24] [1917] A. C. at p. 467.
[25] At p. 471.

the expense and annoyance of an appeal or acquiesce in a decision which nothing will persuade him to be other than capriciously unjust. In France and Germany, we are told, the modern tendency has been in favour of recognising the binding force of decided cases. This is still more markedly so in jurisdictions like the Union of South Africa and the Province of Quebec—no doubt it is the same in the Philippines,—where the civil law comes into close contact with common law influences. Perhaps it would be rash to assume that this phenomenon manifests itself in all civil law countries, but it would not be surprising if it did. Meanwhile there are some indications that in common law jurisdictions the pendulum is swinging in the other direction. Nor can it well be otherwise. We live in a world in which everything is in flux. How can law subsist if it continues to patter the language of dead ages? Some new way must be found—some way (*pace* Lord FINLAY) of interpreting law in accordance with the spirit of the age.

The great significance of the judgments of the Lords in *Bowman* v. *The Secular Society, Limited,* is that they have in fact attempted to restate the law in harmony with modern conditions. But, and this is equally significant, they have done so—if one may respectfully say it—with imperfect success. Fettered by a traditional method of enquiry they have failed to solve the questions what blasphemy is today, and how far and why it falls within the scope of the criminal law. Let it be granted that the courts no longer punish it as an insult to God. Is there no alternative but the paradoxical conclusion that it is punished merely as it tends to a breach of the peace? Another view would be that blasphemy is essentially an affront to a primordial right of a man's personality, a kind of moral obscenity, an outrage upon the liberty of thought and belief which the modern law allows to every citizen. Thus regarded, whether blasphemy is criminally punishable will be largely a matter of circumstance. Lapses from good taste and right feeling may be overlooked in private conversation, which ought not to be tolerated if paraded in public; and public plasphemy again will be more easily condoned in an advertised lecture or address, when a shocked auditor may be thought to have "come to the nuisance", than on a tramcar or in the public street, where decent people are entitled to protection from language which is offensive to their feelings. This aspect of the case might be ventilated on a fitting occasion. To do so now lies outside the scope of the writer's purpose.

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